

EXH

Reilly response to State Fund demand letter

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March 27, 1981

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Minnesota Department of Health  
717 Southeast Delaware  
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Re: Notice of Claim under Section 112 of  
Public Law 96-510

Gentlemen:

By letter dated January 20, 1981, you advised our client, Reilly Tar and Chemical Corporation, that you were asserting a claim, in accordance with §112(a) of the Comprehensive Environmental Response Compensation and Liability Act of 1980, P.L.96-510, for various natural resources damages and costs of removal and remedial action. Reilly Tar has asked us to respond on its behalf to your letter.

It appears that your claim is not authorized under P.L.96-510. Section 107 of that Act, which you assert as the basis of Reilly Tar's liability, expressly provides in subsection (f) that there shall be no recovery for damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release, where such damages and the release of a hazardous substance from which such damages resulted have occurred wholly before the enactment of the Act. This section thus bars any claim against Reilly Tar for "natural



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resource damages." As to a claim for the costs of removal and remedial action, §107(a)(A) expressly provides that liability for such costs incurred by a state is only for those costs "not inconsistent with the national contingency plan." To our knowledge, no revised national contingency plan has yet been promulgated. Unless and until such a plan is promulgated, we are unable to ascertain whether any actions taken by the State are "not inconsistent" with that plan. Accordingly, it is clear that Reilly Tar need not respond on the merits to your claim at this time. Indeed, we are unaware of any authorization by which the State of Minnesota or any of its agencies may act to incur response costs under the Act.

In addition to the above, §112 of the Act allows presentation only of those "claims which may be asserted against the Fund pursuant to §111." Section 111(h)(1) expressly provides that damages for injury to, destruction of, or loss of natural resources resulting from a release of a hazardous substance, for purposes of the Act, shall be assessed by federal officials acting in accordance with regulations promulgated under §301(c) of the Act and designated by the President under the national contingency plan. Again, there is as yet no such plan. Moreover, §301(c)(1) provides that the President, acting through federal officials designated by the national contingency plan shall promulgate regulations for the assessment of damages for injury to, destruction of, or loss of natural resources resulting from a release of a hazardous substance for purposes of the Act. Such regulations are to specify measures of damages, protocols for conducting assessments, and the "best available procedures" to determine damages, direct and indirect injuries, destruction, or loss, taking into consideration such factors as replacement value, use value, and the ability of the ecosystem or resource to recover. See Section 301(c)(2). Absent the national contingency plan and the required regulations dependent upon it, damages cannot be assessed and no claim therefor can be made. Please note also that the costs of any state efforts in the restoration, rehabilitation, or replacement or acquiring the equivalent of any natural resources injured, destroyed, or lost as a result of a release of a hazardous substance, in the absence of an emergency, may not be recovered until a plan has been developed and adopted by affected federal agencies and the governor of the state within which natural resource damages are alleged to have occurred, which plan may be adopted only after adequate public notice and opportunity for hearing and consideration of

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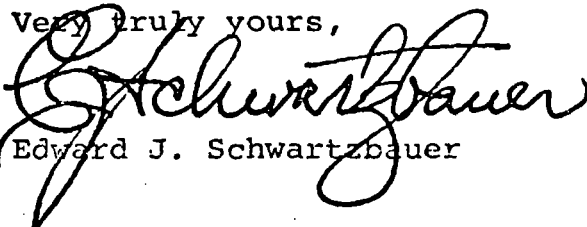
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all public comment. See §111(i). In the instant case, there is no emergency, and we are unaware of the proper adoption of any such plan.

The above response is not meant to be exhaustive, but rather is meant to call your attention to certain provisions of the Act which indicate that your claim is unauthorized. In addition to the above, Reilly does not believe that the measures outlined in your Complaint in Intervention are either appropriate or necessary. There has been no showing that any problem which may exist at or near the former Reilly Tar site in St. Louis Park cannot be completely corrected by water treatment presently in place. There has been no showing of illness or disease attributable to the drinking water of St. Louis Park. In fact, there has been no showing that polynuclear aromatic hydrocarbons have ever been found in the drinking water of St. Louis Park after treatment. The radical and expensive steps which you have proposed are thus clearly inappropriate. Indeed, the very Act under which you have attempted to assert a claim is replete with requirements that any action taken be cost effective, balanced, and appropriate, given the instant situation. The measures which you suggest do not meet those requirements.

We continue to be willing to participate in discussions with you in an effort to reach a fair and amicable resolution of this dispute.

Very truly yours,



Edward J. Schwartzbauer

EJS:ml

cc: Robert Polack, Esq.  
Stephen Shakman, Esq.  
William G. Miller, Esq.  
Thomas K. Berg, Esq.  
Allen Hinderaker, Esq.

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# Abstract:

- 107(f) → No recovery if all damage occurred prior to Act
- 107(a) → liability only for costs not inconsistent w/ NC Plan
- 112 → allows only those claims which may be presented pursuant to §111
- 111(b)(1) → states that NR damages shall be assessed by fed. officials pursuant to regs promulgated pursuant to §301(c)
- 301(c)(1) → says President through officials designated by NC Plan shall promulgate regs relating to assessment of natural resources damages
- 111(b)(i) → state money spent to replace natural resources may not be recovered (in the absence of an emergency) unless done pursuant to a plan adopted by fed + state w/ public notice, hearing & comment.

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